Nos. 15-7777 & 15A750

In the Supreme Court of the United States

IN RE RICHARD ALLEN MASTERSON,
Petitioner.

On Original Petition for Writ of Habeas Corpus
and Application for Stay of Execution

BRIEF IN OPPOSITION TO PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION

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BRIEF IN OPPOSITION TO
PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS AND
APPLICATION FOR STAY OF EXECUTION

Richard Allen Masterson is a Texas death-sentenced inmate scheduled to be executed after 6:00 p.m., Wednesday, January 20, 2016. He is seeking to invoke this Court's original jurisdiction following the Fifth Circuit's denial of his motion for authorization to file a successive habeas corpus application in the district court, pursuant to 28 U.S.C. § 2244(b)(3). He also seeks a stay of execution. As his underlying grounds for relief, Masterson is claiming that he is actually innocent of his capital murder conviction because he has new evidence demonstrating that the medical examiner, Dr. Paul Shrode, provided false testimony that Masterson's victim, Darin Honeycutt, died from asphyxiation and that Honeycutt actually died from a lethal arrhythmia caused by an obstructed coronary artery. Masterson further alleges that the State knowingly presented false testimony from Dr. Shrode and suppressed evidence that could have impeached Dr. Shrode's testimony. Finally, he claims that he has new evidence demonstrating that he falsely confessed to the police. For the following reasons, the petition should be denied, and Masterson is not entitled to a stay of execution.

STATEMENT OF THE CASE

Masterson was found guilty of the robbery-related capital murder of Darin Honeycutt and sentenced to death. 2 CR 318-19.[1] His conviction and sentence were affirmed on appeal, *Masterson v. State*, 155 S.W.3d 167 (Tex. Crim. App. 2005), and certiorari review was denied, *Masterson v. Texas*, 546 U.S. 1169 (2006). His first application for state habeas corpus relief was denied, *Ex parte Masterson*, No. WR-59481-01, 2008 WL 3855113 (Tex. Crim. App. Aug. 20, 2008) (unpublished), and his second was dismissed as abusive, *Ex parte Masterson*, No. WR-59481-02, 2012 WL 6630160 (Tex. Crim. App. Dec. 19, 2012) (unpublished). The federal district court denied his petition for habeas corpus relief and denied permission to appeal. *Masterson v. Thaler*, No. 4:09-CV-2731, 2014 WL 808165 (S.D. Tex. Feb. 28, 2014) (unpublished). The Fifth Circuit subsequently denied Masterson a certificate of appealability (COA). *Masterson v. Stephens*, 596 Fed. Appx. 282 (5th Cir. Jan. 9, 2015)

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[1] "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, preceded by volume number and followed by page number(s). "RR" refers to the reporter's record of the trial testimony, preceded by volume number and followed by page number(s). "SX" refers to the numbered exhibits offered and admitted into evidence at trial by the State, followed by exhibit number(s). "SHCR" refers to the state habeas clerk's record, followed by page number(s).

(unpublished). This Court denied Masterson certiorari review. *Masterson v. Stephens*, 135 S. Ct. 2841 (2015).

On December 30, 2015, three weeks before his scheduled execution, Masterson filed a third state application for habeas corpus relief. The Texas Court of Criminal Appeals dismissed the application as an abuse of the writ pursuant to Texas Code of Criminal Procedure, Article 11.071, Section 5(a). *Ex parte Masterson*, 59,481-03 at Order (January 11, 2016). Masterson then filed a motion for authorization to file a successive petition in the Fifth Circuit and a motion for stay of execution. The Fifth Circuit denied Masterson authorization to file a successive petition and denied the motion to stay on January 15, 2016. *In re Masterson*, Nos. 16-20031 & 16-20036 (5th Cir. 2016) (unpublished).

STATEMENT OF FACTS

On Saturday morning, January 27, 2001, Alfred Bishop, the manager of a Houston apartment complex, was approached by friends of Darin Honeycutt. 18 RR 18-19, 21, 34. The friends were worried about Honeycutt because he had not shown up for work. *Id.* at 21. They asked to be let into his apartment. *Id.* After Bishop opened Honeycutt's apartment, they found Honeycutt's naked body in the bedroom. *Id.* at 38-39. And Honeycutt's car was not in the parking lot. *Id.* at 36, 135.

Houston homicide detective Sgt. R. Parish was assigned to the case. *Id.* at 131. Parish was contacted by Morgan Porter, who had heard of Honeycutt's death. *Id.* at 117-18. Porter knew Masterson because Masterson's brother, James, worked for him. *Id.* at 109. The day after Honeycutt's murder, Masterson came looking for his brother, who was not at work. *Id.* at 110-11. Masterson told Porter: "I think I really put somebody to sleep." *Id.* at 112-13. Porter saw that Masterson was driving a red Ford Escort. *Id.* at 114. Asked where he had gotten the car, Masterson failed to respond. *Id.* He said, however, that he was going back to Georgia. *Id.*

James Masterson also contacted Sgt. Parish and told the sergeant that he thought his brother had gone to Georgia. *Id.* at 168. James contacted Masterson and told him to call Sgt. Parish to clear up the circumstances surrounding Honeycutt's death, which was thought possibly to be the result of a heart attack. *Id.* at 169-71. Of the heart-attack theory, Richard Masterson told his brother, "[T]hat was bull shit" and that he "put [Honeycutt] down." *Id.* at 170-71. James understood Masterson's statement to mean that he had killed Honeycutt. *Id.* at 171. Masterson told James that he had Honeycutt in a headlock until he went limp. *Id.* at 174. Eventually, investigators found Honeycutt's red Ford Escort in Emerson, Georgia. *Id.* at 138.

Eight days after Honeycutt's death, Masterson met Steven Drew in a gay club in Tampa, Florida. 19 RR 201. The two left the club in Drew's vehicle

and went to Drew's apartment. *Id.* at 203. There, Masterson jumped Drew and placed him in a headlock. *Id.* at 206. Drew said, "There was nothing sexual about it. . . . [I]t was really violent and I knew it had nothing to do with sex at all." *Id.* at 206-07. Drew fell to the ground; Masterson straddled him and continued to strangle him with both hands. *Id.* at 209. Drew lost consciousness, and when he came to, his wallet and car were gone. *Id.* at 209-10. Drew had bruises around his throat, he lost his voice for a few days, and the blood vessels in his eyes were broken. *Id.* at 211.

On February 6, 2001, Deputy E. Thoreson, an officer with the Belleview, Florida, Police Department, was running tags in a mobile home park when he came across a Toyota—Drew's car—which had been reported stolen. *Id.* at 48-49, 226. After Masterson was identified as the driver of the car, he was arrested. *Id.* at 48-49, 226-28; 18 RR 143-44.

While Masterson was in the Marion County, Florida, jail, he confessed both to the attack on Drew and Honeycutt's murder. 19 RR 59-89, 230-31. Houston Police Detective David Null recorded Masterson's statement, and the tape was played for the jury. *Id.* at 70-89; SX 2. In the statement, Masterson said he strangled and killed Honeycutt to steal his car. 19 RR 70-80; SX 2. Asked what happened with Drew, Masterson said: "Pretty much the same thing I did in Houston, except the person didn't die. . . . I didn't let the person get undressed this time." 19 RR 230.

At trial, Masterson testified at guilt-innocence. Although he acknowledged killing Honeycutt, he said the death was an accident that occurred during sex. *Id.* at 114-78. He said Honeycutt asked him to put his arm around his neck to perform erotic asphyxiation. *Id.* at 126-27. In the process, Honeycutt went "limp" from the "sleeper hold" and died. *Id.* at 128-29. Masterson said he fled because he had convictions. *Id.* at 130-31. To make the incident appear to be a robbery, he took Honeycutt's VCR and car. *Id.* at 130-32.

Dr. Shrode, assistant Harris County medical examiner, conducted Honeycutt's autopsy. 18 RR 193. Dr. Shrode believed Honeycutt's death was caused by "external neck compression." *Id.* at 205, 208. Dr. Shrode said that Honeycutt had a narrowed coronary artery. *Id.* at 208. The doctor ruled out the narrow artery as the cause of death but said the condition may have hastened the death. *Id.* at 206-08. Dr. Shrode said Honeycutt's death was consistent with his having been subjected to a "sleeper hold," in which Masterson pressed the inside of his elbow against Honeycutt's windpipe and applied pressure. *Id.* at 201, 209.

REASONS FOR DENYING THE WRIT

Masterson's claims, which are presented in an original petition for writ of habeas corpus, are unworthy of this Court's attention. Rule 20.4(a) of the RULES OF THE SUPREME COURT OF THE UNITED STATES provides that "[t]o

justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted." *See Felker v. Turpin,* 518 U.S. 651, 665 (1996) (explaining that Rule 20.4(a) delineates the standards under which this Court grants such writs). For the reasons explained below, Masterson fails to advance a compelling or exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus in this case.

I. Masterson Fails to Meet the Requirements of 28 U.S.C. § 2242 and Supreme Court Rule 20.4(a) for an Original Petition.

Rule 20.4(a) and 28 U.S.C. § 2242 state that an original habeas petition in the Supreme Court must set forth "reasons for not making application to the district court." In this case, the reasons are clear: Masterson's original habeas petition is actually a *successive* habeas petition. However, this Court's consideration of a successive habeas petition is subject to "the restrictions on repetitive and new claims imposed by [28 U.S.C.] § 2244(b)(1) and (2)." *Felker*, 518 U.S. at 662-63. According to section 2244(b), "[a] claim presented in a second . . . habeas corpus application . . . that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). Claims that were not presented in an applicant's first habeas petition must also be dismissed unless the applicant makes one of two showings. First, leave to file a second habeas

petition may be granted if the applicant shows his new "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). Second, an applicant can obtain leave to file a second habeas petition if he shows "the factual predicate for the [new] claim could not have been discovered previously through the exercise of due diligence," 28 U.S.C. § 2244(b)(2)(B)(i), and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii).

A petition containing new allegations is successive if it runs afoul of abuse-of-the-writ principles. *See Slack v. McDaniel*, 529 U.S. 473, 486 (2000); *Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'"). Circuit courts have determined that a claim constitutes an abuse of the writ if it challenges a petitioner's conviction or sentence that was or could have been raised in an earlier petition. *Adams v. Thaler*, 679 F.3d 312, 322 (5th Cir. 2012); *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005); *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002); *see also McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (abuse of the writ occurs

when a petitioner raises a habeas claim that could have been raised in an earlier petition but for inexcusable neglect).

The primary claim in Masterson's original petition is that he is actually innocent of capital murder because the testimony from the medical examiner, Paul Shrode, that Honeycutt died due to asphyxiation was incorrect. Masterson essentially seeks to undermine Dr. Shrode's credibility with a variety of claims and then he presents the opinions of other doctors who dispute Dr. Shrode's trial testimony that Honeycutt died as the result of homicide. Masterson also contends that the State was complicit, concealed evidence about Dr. Shrode's qualifications, and presented false testimony from Dr. Shrode.

First, as a preliminary matter, Masterson's claims do not rely on a new, previously unavailable rule of constitutional law made retroactive to cases on collateral review.

Second, this Court has never held that claims of actual innocence are cognizable on federal habeas review. A claim of innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). In fact, the Fifth Circuit has repeatedly held that actual-innocence allegations are not cognizable on federal habeas. *Reed v.*

Stephens, 739 F.3d 753, 766 (5th Cir.), *cert. denied*, 135 S. Ct. 435 (2014); *Foster v. Quarterman*, 466 F.3d 359, 367 (5th Cir. 2006) (citing *Dowthitt v. Johnson,* 230 F.3d 733, 741-42 (5th Cir. 2000)). Therefore, the Court should not "entertain [Masterson's] stand-alone claim." *Foster*, 466 F.3d at 368.

Third, Masterson presented essentially the same claim in his initial federal petition when he argued that trial counsel was ineffective for not presenting an expert to challenge Dr. Shrode's testimony. On state habeas and federal habeas review, Masterson presented an affidavit from Dr. Paul Radelat, who disputed Honeycutt's cause of death. Specifically, Dr. Radelat opined that the sleeper hold Masterson applied to Honeycutt's neck resulted in a fatal cardiac arrhythmia exacerbated by Honeycutt's narrowed coronary artery. *See Masterson v. Thaler*, 4:09-cv-02731 (S.D. Tex. 2014), Docket Entry (DE) 79 at 19-20. However, trial counsel did in fact have a doctor, Robert Walmsey, standing by at trial to dispute Dr. Shrode's testimony. But counsel chose not to place Dr. Walmsey on the stand because Dr. Shrode conceded every point the defense wanted to make about the possibility that Honeycutt died due to the narrowed coronary artery. SHCR 146. Counsel then made those points to the jury. As the Fifth Circuit stated, "'In fact, the only meaningful difference between the information derived during cross-examination [at the original trial] and that in Dr. Radelat's affidavit is an expert opinion that the death was not accidental.'" *In re Masterson*, No. 16-

20031 at 6-7 (quoting DE 79 at 35-36). The federal court determined that Masterson, thus, could not demonstrate any prejudice due to counsel's failure to present the expert. DE 79 at 21-24.

In this case, Masterson is raising the same claim; he is simply attempting to skirt 28 U.S.C. § 2244(b)(1) by couching the claim in terms of actual innocence rather than ineffective assistance of counsel and using different experts to dispute Dr. Shrode's testimony. He should not be permitted to do so. But even if he could, he certainly cannot overcome 28 U.S.C. § 2244(b)(2)(B) because (1) the factual predicate of the claim—as well as the allegations of prosecutorial misconduct—has been available to him for years, as evidenced by his presentation of the ineffectiveness allegation in his original federal petition and (2) he cannot show that the new facts, if true, "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(i) & (ii). The Fifth Circuit properly held that "[a]lthough [Masterson's] witness may be 'new,' the issue of causation is as old as the case itself. . . . Masterson, then, cannot argue that the evidence related to the disagreement over causation is newly discovered." *In re Masterson*, No. 20031 at 5, 7.

Notably, Masterson's arguments and exhibits pertaining to Dr. Shrode's prior misdeeds date back to 1997, and most of the events in question occurred

well before Masterson filed his first federal petition. Moreover, as discussed below, Masterson's claim amounts to a disagreement among experts regarding cause of death, which the jury resolved in the State's favor. This is not a case where a petitioner has new evidence that he is truly innocent of the crime, i.e. the State convicted the wrong person of the capital offense.

In addition, belying Masterson's claim is the fact that he confessed to murdering Honeycutt long after the crime. On federal habeas review, Masterson sent to the Texas Attorney General's Office and the federal district court a confession, asking that an execution date be set. *See* Exhibit A, attached. In this confession, Masterson stated:

> I did in fact murder Mr. Honeycutt. I had every intention of killing him the night I went to his apartment. I put him in a choke hold and held it as tight as I could for at least 4 to 5 minutes. I had no intention of ever leaving that apartment that night until Mr. Honeycutt was dead.
>
> At first that night I only wanted a ride but later after Honeycutt said something I had every intention of killing him. I meant to kill him[;] it was no accident.
>
> I am sorry I did it and I am forced to live with this regret every day that I took this innocent man[']s life for a few dollars and a car.

Exhibit A. Given this document, as well as Masterson's confession to the police, there simply is no dispute that he intentionally murdered Darin Honeycutt. Supposedly "new" evidence that amounts to a disagreement about

cause of death, rather than evidence of true actual innocence, is insufficient to overcome the stringent requirements of 28 U.S.C. § 2244(b).

II. Masterson's Claims Are Wholly Lacking In Merit.

A. Disagreement about cause of death

Masterson's claims are based on Dr. Shrode's January 28, 2001, autopsy of Honeycutt and Dr. Shrode's testimony during Masterson's capital murder trial. In support of his challenge to Dr. Shrode's work, Masterson relies on the December, 2015, report of forensic pathologist Christena Roberts, M.D., summarizing her review of Dr. Shrode's work and her disagreement with Shrode's conclusions regarding Honeycutt's cause of death.

However, Dr. Roberts 2015 report does not constitute newly discovered evidence. Dr. Roberts does not assert in her report that she was relying on new scientific discoveries to reach her opinions concerning Dr. Shrode's work; she merely disagreed with Dr. Shrode's opinions based on a review of his autopsy report, autopsy photos, and his testimony at trial. Simply because Masterson obtained the opinion of another pathologist a month before his scheduled execution does not establish that another opinion was not available at trial or during prior habeas proceedings. Significantly, as shown above, during initial state habeas proceedings, Masterson presented the affidavit of forensic pathologist Dr. Radelat to support his habeas claim that trial counsel were ineffective for failing to obtain independent expert testimony to refute Dr.

Shrode's conclusion that external neck compression caused Honeycutt's death. Dr. Radelat, much like Dr. Roberts, reviewed the autopsy report, Dr. Shrode's trial testimony, and Masterson's testimony in reaching his conclusions regarding Dr. Shrode's opinion and testimony concerning the cause of death.

Indeed, the Fifth Circuit correctly held that Dr. Roberts' opinion did not constitute "new" evidence for 2244(b) purposes:

> Dr. Roberts's criticisms of the autopsy report are not based upon a "new" factual predicate but upon the original autopsy presented at the original trial, which was previously reviewed by two different defense experts (one at the original trial and one as part of the original state habeas proceeding). Dr. Roberts's "new" criticisms of an old document are not "new" within the meaning of successive habeas applications. *See Dowthitt v. Johnson*, 230 F.3d 733, 742–43 (5th Cir. 2000) (holding that newly submitted affidavits, the substance of which was presented at the original trial, did not qualify as newly discovered evidence); *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998) (distinguishing a petitioner's "knowledge of the factual predicate" of a claim with the "gathering [of] evidence in support of that claim"); *cf. Prince v. Thaler*, 354 F. App'x 846, 848 (5th Cir. 2009) (finding new expert testimony insufficient to toll the statute of limitations on a habeas petition because it merely opined that the State's scientific testing process was imperfect and failed to rebut other circumstantial evidence); *Turner v. Epps*, 412 F. App'x 696, 704–06 (5th Cir. 2011) (denying a certificate of appealability because "the opinions expressed in the new expert affidavits . . . indicate[d] a mere disagreement among experts").

In re Masterson, No. 16-20031 at 5 n.4.

Moreover, the theories asserted by Dr. Radelat and Dr. Roberts were presented during Masterson's capital murder trial. As mentioned above, trial counsel consulted a medical expert, cardiologist Robert Walmsley, M.D.,

regarding Honeycutt's manner of death. Trial counsel prepared for cross-examination of Dr. Shrode through their consultation with Dr. Walmsley, who suggested areas of questioning for trial counsel to pursue, and counsel ultimately decided not to present Dr. Walmsley as a defense expert after Dr. Shrode conceded crucial points about which Dr. Walmsley would have testified.

For instance, on direct examination, Dr. Shrode testified that the cause of death was external neck compression. However, because Honeycutt's coronary artery was narrowed, the heart muscle required more blood in the stressful situation and if it cannot get that blood, that portion of the heart is more susceptible to a heart attack. 18 RR 208. On cross-examination, Dr. Shrode conceded the following: (1) the congested palebral and bulbar conjunctiva in Honeycutt's eyes could have occurred due to gravity because of the position he was in, and it is not possible to determine if the congestion itself was caused by compression or gravity, *id.* at 217; (2) the pressure applied to Honeycutt's neck may have caused his heart to become arrhythmic, which is probably how he died, *id.* at 220; (3) people can die from heart arrhythmias and when autopsies are done, it is not possible to tell whether a heart attack occurred, *id.* at 221; (4) Honeycutt had an abnormal coronary heart condition for a person of his age and when occluded, the heart requires more blood during times of stress, *id.* at 222-23; (5) a sleeper hold is very stressful to the heart, *id.* at 224; (6) there was no evidence of hemorrhaging or injury to the hyoid or

thyroid cartilage in Honeycutt's neck, *id.* at 226-27; (7) it is unusual to see a neck that does not reveal any trauma when the person has been strangled to death, *id.* at 228; (8) the lack of petechiae of the larynx or trachea—*i.e.* signs of strangulation—indicates Masterson applied a sleeper hold to Honeycutt as opposed to manual strangulation, *id.* at 228-29; (9) the toxicology report showed Honeycutt's blood alcohol level was .11—above the legal limit for driving—which could have contributed to an arrhythmia, *id.* at 229-30; (10) a sleeper hold could be involved in autoerotic asphyxiation, particularly where the person applying the hold is engaging in anal intercourse, *id.* at 233; (11) if a person was unconscious and left in the unusual position in which Honeycutt was found—face down into the rug with his legs on the bed pointing upward—and if the neck was flexed on the chin toward the chest, then it is possible returning blood flow could be interrupted, *id.* at 234-35; and (12) when applied, the sleeper hold causes a person to lose consciousness in only a few seconds, but it might take longer if the persons involved in the sexual act wanted it to last. *Id.* at 236.

In sum, based on the direct and cross-examinations, the medical examiner left open the possibility that Honeycutt and Masterson were engaged in a sexual act, that Masterson applied a sleeper hold from behind—rather than a manual choke hold—to assist Honeycutt in the act, and that Honeycutt's death was accelerated due to his heart condition and unusual body

position. Thus, Dr. Shrode's testimony differed little from Masterson's supposed new evidence.

Moreover, Dr. Shrode essentially admitted that, other than his belief that there is no reason to continue asphyxiation during sex if the person passes out, he had no evidence that would differentiate intentional strangulation from a sexual and accidental asphyxiation. 18 RR 230-38. Indeed, he acknowledged that intent is rather difficult for pathologists to determine. *Id.* at 238. During final argument, defense counsel stated:

> [Dr. Shrode] jumped on the home team's train just a little bit in this trial because when I tried to press him about his findings he said, well, it just couldn't have been. Why is that, Doctor? Well, it just couldn't have been. Why is that, Doctor? Because if you choke someone until they're unconscious why would you keep going? You'd stop. Well, that does make sense. Is that the only thing you can point to, Doctor? I think I asked him three times, and I think that was the only thing he ever came up with. He said, well, normal blood flow will resume, but that was only a surmise on his part. He doesn't know that. He admitted that the body was in this shape, no, this position - - excuse me - - with his head down. He admitted that gravity could have caused all these injuries that he found as well as the sleeper hold. Nothing he could point to said this is definitive that this was an intentional external compression.

20 RR 20-21. Therefore, not only did the defense force the doctor to concede issues on cross-examination, but the defense also made the point that Dr. Shrode's opinion regarding intent was out of his realm of expertise.

In short, the issues Masterson claims were "suppressed" were all brought out at trial. His claim does not actually amount to one of actual innocence but

rather a conflict in the evidence resolved against him. As the Fifth Circuit has long held, "[i]t is the sole province of the jury, and not within the power of this Court, to weigh conflicting evidence and evaluate the credibility of witnesses." *United States v. Seale*, 600 F.3d 473, 496 (5th Cir. 2010) (citation omitted); *see also United States v. Dula*, 989 F.2d 772, 778 (5th Cir. 1993) ("This court's review does not encompass weighing the evidence or judging the credibility of witnesses.") (citation omitted).

Finally, Masterson also complains about Dr. Shrode's qualifications and claims that his "misleading" testimony is concerning because Dr. Shrode, "is a prolific, habitual liar" and has "botched" other autopsies. Dr. Shrode's unrelated professional difficulties do not constitute a basis for habeas relief. It should be noted that, in 2010, the Court of Criminal Appeals dismissed capital defendant Michael James Perry's subsequent writ application in which Perry relied, in part, on Dr. Shrode's professional issues to support his subsequent habeas claim of actual innocence. *See Ex parte Perry,* No. 62, 906-02, 2010 WL 2618086 (Tex. Crim. App. June 24, 2010) (not designated for publication). Additionally, in 2014, the Court of Criminal Appeals dismissed capital defendant Suzanne Margaret Basso's subsequent writ application in which she too relied, in part, on Dr. Shrode's professional issues to support her subsequent habeas claim that her death sentence violated the Eighth

Amendment. *See Ex parte Basso*, No. 63,672-02, 2014 WL 467743 (Tex. Crim. App. Feb. 3, 2014) (not designated for publication).

B. Other evidence of guilt

Any notion that Masterson is actually innocent is further undermined by the additional trial evidence. Masterson approached Morgan Porter after the crime and told him "I think I put somebody to sleep." 18 RR 112. Porter then asked Masterson if he *just* put someone to sleep and Masterson said, "No, I think it was more than that, and he said I think I really put somebody to sleep." *Id.* at 113. Masterson also said that he thought about stopping but decided to go on, referring to putting the person to sleep. *Id.* at 116.

When Masterson talked to his brother James, James stated that he heard Honeycutt may have died from a heart attack, to which Masterson replied "that was bull shit." *Id.* at 170. Masterson also told James "that he put [Honeycutt] down." *Id.* Later, James talked to Sergeant Parish and told Parish that Masterson said "he just had [Honeycutt] in a headlock 'til he went limp." *Id.* at 174.

Masterson's confession removed any doubt whether the crime was intentional or an accident. Masterson stated that he met Honeycutt at Cousins bar after 12:00 a.m. Friday morning. 19 RR 72. They "hit it off," and Honeycutt asked Masterson if he wanted to go home with him. *Id.* at 73. They hung out until closing time and then left, first taking a couple of people home. *Id.*

Masterson and Honeycutt were in Honeycutt's red Ford Escort. *Id.* at 74. They proceeded to Honeycutt's apartment on Jackson Street and arrived there about 2:30 or 2:45 a.m. *Id.* at 74-75. Once inside, they went to the bedroom, and Honeycutt got undressed. *Id.* at 75. Masterson then grabbed Honeycutt around the neck, and Honeycutt never moved. *Id.* Masterson stated that he put Honeycutt's windpipe in the pit of his elbow and squeezed, and Honeycutt never struggled—he just went to sleep. *Id.* at 76. Masterson then pushed Honeycutt down on the bed. *Id.* However, Honeycutt slid in a strange position—face on the floor, legs elevated on the bed—while Masterson still had him around the neck. *Id.* at 76-77.

When Officer Null asked Masterson if he intended to kill Honeycutt, he responded, "Um, yeah, I think so." *Id.* at 77. Masterson explained that he did this because he needed a car. He had no intent on having sex with Honeycutt; he just played along to get the car. *Id.* When they left to go to Honeycutt's, Masterson did not know he was going to kill Honeycutt to get the car, but something told him in his mind that he was going to commit murder. *Id.* at 78. After Masterson grabbed Honeycutt around the neck and Honeycutt "went to sleep," "I just said to hell with it, I might as well go all the way with it now." *Id.* Masterson then put his jacket on, took the VCR, grabbed the car keys, and left. *Id.* He looked in Honeycutt's jewelry box but did not see anything he wanted, so he set the drawer on the floor. *Id.* at 80.

The prosecution also played a portion of Masterson's confession pertaining to Steven Drew. On the tape, Masterson told Officer Null he was in Tampa and did "pretty much the same thing I did in Houston, except the person didn't die ... I didn't let the person get undressed this time." *Id.* at 230.

In sum, Masterson is not an innocent man; he is guilty and has admitted to his crime on numerous occasions, including during federal habeas review. His claims, therefore, have no merit.

C. Prosecutorial misconduct

Masterson claims the State presented false and misleading expert testimony and suppressed exculpatory and impeachment evidence pertaining to Dr. Shrode. With regard to false evidence, a due process violation occurs only if: (1) the State offers false testimony; (2) the false testimony was material; and (3) the prosecution knowingly failed to correct the false testimony. *Giglio v. United States,* 405 U.S. 150, 153-54 (1972). Likewise, in order for a petitioner to show that the State suppressed evidence in violation of due process, the petitioner must make three showings: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The State bears "no responsibility to direct the defense toward potentially exculpatory evidence that either is in the possession

of the defense or can be discovered through the exercise of reasonable diligence." *Bigby v. Cockrell*, 340 F.3d 259, 279 (5th Cir. 2004); *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1998). Further, "[w]hen evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002).

The Director has shown above the lack of materiality with respect to Masterson's new evidence. Additionally, Masterson completely fails to demonstrate that the State *knowingly* presented false testimony or suppressed material evidence. His claims of State malfeasance are entirely unsubstantiated and conclusory, which are inadequate to warrant relief. *Koch v. Puckett*, 907 F.2d 524, 530 (1990). Indeed, the fact that Masterson, at the eleventh hour, comes forward with "new" evidence reveals that the evidence has always been available to him.

Further, as the Fifth Circuit discussed,

> with the exception of the misstatement in Dr. Shrode's application to Harris County, all of the supposedly exculpatory impeachment evidence that the State allegedly concealed either had not yet occurred when Dr. Shrode testified at Masterson's trial in 2002 (the alleged misstatements to El Paso, the "reprimands" by Harris County, and the alleged lies in the child protective trial) or could not have been discovered by the State of Texas at that time (the "botched autopsy" of 1997 in Ohio that did not come to light until 2010). Perhaps arguably a prosecutor has a continuing obligation to turn over impeachment evidence that was previously improperly suppressed. However, Masterson points to no

> authority for the proposition that a prosecutor has a duty to turn over subsequently discovered information about a witness related to events that *had not yet occurred* at the time of trial but would nevertheless, if a time machine were available, be useful to impeach the witness's credibility. *See generally Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009) (discussing temporal limitations on *Brady* duties). Masterson's theory essentially is that if a witness who testifies for the State ever lies or commits other misdeeds thereafter, the defendant is entitled to a new trial. Masterson provides no case that reaches that broadly, nor would such a rule make sense.

In re Masterson, No. 16-20031 at 10-11 (emphasis in original). In short, a prosecutor cannot engage in misconduct for failing to turn over evidence not yet in existence. Masterson's claims are evidently meritless and should be rejected.

D. False confession

Masterson also renders the accusation that new expert opinion reveals that his confession was rehearsed and false. First, to the extent Masterson is claiming his confession was involuntary, that claim has been rejected by both the state and federal courts. 2 RR 198; *Masterson v. State*, 155 S.W.3d at 170-71; DE 79 at 62-66; *Masterson v. Stephens*, 596 Fed. App'x at 286.

Second, Masterson's claim is improper because he is attempting to show that an expert believes his confession was involuntary. The Fifth Circuit has rejected such legal opinions as invading the province of the trier of fact. *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997); *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992); *Matthews v. Ashland Chem., Inc.*, 770 F.2d 1303,

1311 (5th Cir. 1985); *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). Moreover, although Rule 704 of the Federal Rules of Evidence allows for expert opinion testimony that embraces an ultimate issue to be decided by the trier of fact, it "does not open the door to all opinions." *Owen,* 698 F.2d at 240. Specifically, it does not allow for testimony that tells the trier of fact what result to reach in a case. *Id.* It likewise does not allow a witness to give legal conclusions. *Id.* Thus, the issue is whether the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Salas,* 980 F.2d at 305. As the Advisory Committee Notes to Rule 704 state, "allowing an expert to give his opinion on the legal conclusions to be drawn from the evidence both invades the court's province and is irrelevant." *Id.* Because the jury and courts were well able to judge whether Masterson's confession was involuntary, there is no reason for this affidavit.

Third, Masterson's claim fails because, as shown, he confessed to his capital offense years after his trial. The factors influencing his mental state at the time of his confession to police, such as drug use, obviously have nothing to do with Masterson confessing years later while in prison. Therefore, his contention is clearly meritless.

III. Masterson's Claims Are Time-Barred and Procedurally Defaulted.

The Court should also deny Masterson's petition because his claims are time-barred and procedurally defaulted.

A. Time bar

First, 28 U.S.C. § 2244(d)(1)(A) provides that the one-year limitation period shall run from the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. In this case, Masterson's conviction became final on February 21, 2006, when this Court denied him certiorari review on direct appeal. *Masterson v. Texas*, 546 U.S. 1169 (2006); *see Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). Masterson filed a state application for writ of habeas corpus in the trial court on February 26, 2004. SHCR 2. The limitations period was tolled during this time until August 20, 2008, the date the Court of Criminal Appeals denied Masterson's habeas corpus application. *Ex parte Masterson*, No. WR-59481-01. Thus, Masterson was required to present all claims to the federal district court by August 20, 2009.

Masterson filed his initial federal petition on August 17, 2009. DE 1. The filing of this petition did not toll the limitations period. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). Although Masterson's actual-innocence claim mirrors the ineffectiveness claim he included in his original petition, to extent

they are distinct, the claim is time barred. Further, Masterson never alleged in his original petition that the State knowingly presented false testimony from Dr. Shrode or suppressed evidence pertaining to Dr. Shrode. Therefore, these allegations are time barred by six and a half years.[2]

Additionally, Masterson cannot show that he is entitled to equitable tolling of the limitations period, particularly considering his lack of diligence. *Holland v. Florida*, 560 U.S. 631, 649 (2010) (petitioner entitled to equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing") (citation and internal quotations omitted); *Felder v. Johnson*, 204 F.3d 168, 170-71 (5th Cir. 2000) (equitable tolling "applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights").

Finally, although actual innocence may serve as an equitable exception to the statute-of-limitations bar, that holds true only with respect to new and credible evidence in support of an actual-innocence claim. *McQuiggin v.*

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[2] The Fifth Circuit did not address the statute-of-limitations issue but noted that, with regard to the prosecutorial misconduct claims anyway, the matter should probably be considered under § 2244(d)(1)(D), which holds that the limitations period should run from the date the factual predicate of the claim or claims could have been discovered through the exercise of reasonable diligence. *In re Masterson*, No. 16-20031 at 9 n.6. Without conceding the issue pertaining to the correct limitations starting point, Masterson's claims would still be time-barred because his evidence of Dr. Shrode's misdeeds appear to have occurred several years before he filed his amended federal petition. *See In re Masterson*, No. 16-20031 at 7-8.

Perkins, 133 S. Ct. 1924, 1931-34 (2013). As shown, Masterson's evidence is neither new nor credible. Thus, it is insufficient to overcome the limitations bar. *Id.* at 1935 ("To invoke the miscarriage of justice exception to AEDPA's statute of limitations, we repeat, a petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'") (quoting *Schlup v. Delo,* 513 U.S. 298, 327 (1995)). Moreover, "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing. . . . And frivolous petitions should occasion instant dismissal." *Id.* at 1935-36. Given that Masterson waited until the eleventh hour to assert an actual-innocence claim that essentially rehashed an allegation the state and federal courts already rejected, it is evident that he cannot invoke this exception.

B. Procedural default

Federal review of a habeas claim is procedurally barred if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural bar. *Harris v. Reed*, 489 U.S. 255, 263 (1989). Masterson presented his actual-innocence and confession claims in a subsequent habeas application the Court of Criminal Appeals dismissed for abuse of the writ. *Ex parte Masterson*, 59,481-03 at Order. The Fifth Circuit has repeatedly held that Texas's abuse-of-the-writ doctrine has been consistently applied and is an adequate and independent state ground barring

federal habeas review of claims raised in the abusive application. *Garza v. Stephens*, 738 F.3d 669, 675 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2876 (2014); *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010); *Rocha v. Thaler*, 626 F.3d 815, 837-38 (5th Cir. 2010); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003).

Masterson, however, did not present his prosecutorial-misconduct claims in any state habeas application.[3] Thus, they remain unexhausted. It is well-settled that habeas relief "shall not be granted" under any circumstances unless it appears that "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1). A petitioner must have first provided to the highest court of the state a fair opportunity to apply (1) the controlling federal constitutional principles to (2) the same factual allegations before a federal court will entertain the alleged errors. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995).

In order to satisfy exhaustion, all of the grounds raised in a federal habeas application must have been "fairly presented" to the state courts prior to being presented to the federal courts. *Id.*; *Nobles v. Johnson*, 127 F.3d 409,

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[3] Masterson's last-minute briefing is somewhat confusing on this point. In his subsequent state habeas application, he claimed that the State provided false testimony, but he did not appear to support his claim with any briefing. *See* Application, *Ex parte Masterson*, 59,481-03. Thus, arguably, he has never presented his claims of prosecutorial misconduct to the state court.

420 (5th Cir. 1997). Moreover, "[t]he exhaustion requirement is not satisfied if the prisoner presents new legal theories or factual claims in his federal habeas petition." *Nobles*, 127 F.3d at 420 (citing *Anderson v. Harless*, 459 U.S. 4, 6-7 (1982)).

Further, unexhausted claims are procedurally defaulted for the purposes of federal habeas review because, as in this case, if Masterson returned to state court in order to exhaust his claims by filing a state application, the application would be dismissed for abuse of the writ. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991); *Williams v. Thaler*, 602 F.3d 291, 305-06 (5th Cir. 2010); *Nobles*, 127 F.3d at 422.

Therefore, all of Masterson's claims are defaulted unless he can demonstrate cause for the default and prejudice that is attributable to the default, or prove a miscarriage of justice. *Coleman*, 501 U.S. at 750. Failure to raise a claim in a prior state habeas corpus application may not be excused for cause unless the claim was not "reasonably available" at the time of the prior petition. *Fearance v. Scott*, 56 F.3d 633, 636 (5th Cir. 1995). Further, a miscarriage of justice in this context means that the petitioner is actually innocent of the crime for which he was convicted or of his sentence. *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992).

Masterson does not address this matter in his petition. Regardless, as shown, the above claims have always been available to him, and there is no

merit to his allegation of actual innocence. Therefore, he fails to overcome his procedural default. Consequently, even if Masterson could satisfy the strict requirements of 28 U.S.C. § 2244(b), the claims must still be dismissed.

IV. Masterson Is Not Entitled to a Stay of Execution.

Masterson is not entitled to a stay of execution because he cannot demonstrate a substantial denial of a constitutional right which would become moot if he were executed. In *Barefoot v. Estelle,* this Court explained that a stay is appropriate only when there is a "reasonable probability" that certiorari will be granted, a "significant possibility" that the Court will reverse the lower court's decision after hearing the case, and a "likelihood" that the applicant will suffer irreparable harm absent a stay. 463 U.S. 880, 895 (1983). Masterson has met none of these requirements. As discussed above, Masterson's claims are barred from substantive review in this Court. Thus, there is no possibility that this Court could reverse the judgment of the Court of Criminal Appeals. Masterson's substantive constitutional claims are also without merit. Furthermore, the Court may also "consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. United States Dist. Ct. for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*). Under the circumstances of this case, a stay of execution would be inappropriate and Masterson's motion should be denied.

CONCLUSION

For the above reasons, the Court should deny Masterson's original federal habeas petition and motion for stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Response has been served electronically to Greg Garner, counsel for the Petitioner, on this the 19th day of January, 2016.

/s/ Erich Dryden
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